IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 74 OF 2006

1. Angelo Pais
   r/o Umtawaddo, Calangute,
   Bardez, Goa.
2. Mrs. Clelia D'Melo Pais
   r/o Umtawaddo, Calangute,
   Bardez, Goa. .... Appellants

Versus

Dr. Suresh Balchandra Shetye
R/o. Alto Porvorim,
Bardez, Goa. .... Respondent

Shri C.A. Coutinho, Advocate for the Appellants.
Shri S.D. Lotlikar, Sr. Advocate with Shri M. De Souza, Advocates for the Respondent.

CORAM : **P.V. KAKADE, J,**

DATE : **6th DECEMBER, 2006**

ORAL ORDER:

The unsuccessful defendants have preferred this appeal against the judgment and order passed by Additional District Judge, Mapusa allowing the plaintiff's appeal and decreeing his suit for recovery of a sum of Rs. 65,000/- with interest at the rate of 15% per annum from 5/03/1987 to the date of payment, and thereby reversing the trial Court's order of dismissal of the suit.

2. I heard the learned Counsel for both the parties. Perused the record. The respondent's/plaintiff's case was that on 11/4/1986 the defendants executed two promissory notes in the office of Shri Gopal Tamba, Notary Public, Panaji, Goa. By these promissory notes, the defendants promised to pay the plaintiff on demand, sums of Rs. 40,000/- and Rs. 25,000/- and also promised to pay interest at the rate of 15% per annum. The defendants did not pay the amount to the plaintiff and, therefore, notice was issued dated 16/2/1987, calling upon the defendants to pay the amount with interest. However, the defendants denied to do so by replying to the notice and, hence, the suit.

3. The appellants/defendants came with the case that there was property surveyed under Chalta nos. 4, 5, 6(1), 6(2) and 7 of P.T. Sheet No. 146 and Chalta no. 5 of P.T. Sheet no. 147 of Panaji Town Area. The property belonged to the parents/parents-in-law of the defendants. The plaintiff and one Professor Bakhle were real estate agents . They undertook to find purchasers for the property and parents/parents-in-law of defendants executed power of attorney dated 10/08/1982 to enable them to find prospective purchaser for the property. In the month of September, 1982 the parents/parents-in-law of the defendants also signed an

agreement. It was agreed that power of attorney could be revoked and the agreement could be cancelled at any moment. It was further agreed that plaintiff and Professor Bakhle would pay the parents/parents-in-law of the defendants Rs. 1,25,000/- and the amount received would be taken by the plaintiff as his commission. However, the plaintiff and Professor Bakhle were unable to find a purchaser for the property and, therefore, parents/parents-in-law of the defendants decided to transfer the property to the defendants by way of a family settlement. Thereafter, parents/parents-in-law of the defendants revoked the power of attorney given to the plaintiff and Professor Bakhle by letter dated 8/04/1986. On 9/04/1986, the plaintiff executed a 'Revocation of Sale Agreement' and defendant no.1 and Professor Bakhle signed the same as witnesses. The parents/parents in law of the defendants paid the plaintiff Rs. 15,000/- as full and final settlement of the transaction. On 10/04/1986 the plaintiff demanded Rs. 65,000/- from the defendants and threatened to execute agreements for the sale of the property on old stamp papers and create liability for the defendants. Subsequently, the plaintiff asked the defendants to execute promissory notes as a guarantee to ensure that the defendants would not sell the property for at least one year. Being left with no other option, the defendants had contended that promissory notes came to be executed in the

office of a Notary Public. According to me, the promissory notes were issued only to ensure that defendants do not alienate property for one year and, hence, on such and other grounds, the suit was sought to be dismissed with costs.

4. The trial Court Judge after hearing both the parties and on the basis of available evidence, came to the conclusion that the plaintiff had not proved his case and dismissed the suit. Appeal was carried to the District Court. However, the learned lower appellate Court Judge did not concur with the findings recorded by the trial Court Judge and decreed the suit on the basis of promissory notes, executed by the defendants, mainly on the basis of presumption contemplated under Section 118 of the Negotiable Instrument Act.

Hence the present appeal.

5. At the outset, it may be noted that only the question raised on behalf of the appellant is to the effect that whether the lower appellate Court could draw presumption under Section 118 of the Negotiable Instrument Act, in respect of promissory notes which were not brought on record and that the plaintiffs have not entered the witness box to rebut the

evidence produced by the defendants. Perusal of the trial Court Judgment also appears to be on the same line, in the sense that trial Judge has dismissed the suit on the ground that the promissory notes, which are subject matter of the suit, do not come on record and the plaintiff did not enter the witness box and, therefore, adverse inference was drawn against the plaintiff, holding that he had not proved promissory notes and transactions thereunder as against the defendants' evidence which remained unrebutted.

6. Under the circumstances, the only question for our consideration is whether non production of the promissory notes is the factor sufficient to non suit the plaintiff, inspite of the fact that execution of the said promissory notes is an admitted position throughout the dispute. If we take into account the tenor of the defence of the appellants/defendants, it is the case sought to be made out that promissory notes were executed by the defendants on 11/4/1986. However, those were without consideration and were for the purpose of utilisation as a collateral, for different transactions between the parties and to ensure that defendants do not alienate property for one more year from the date of promissory notes. In other words, it is the case sought to be made out by the defendants that the

promissory notes were executed under duress and no consideration passed there under.

7. If this is the position, then in my considered view, non-production of promissory notes on record and abstinence of plaintiff from entering into the witness box, would be inconsequential due to the clear cut admission of the defendants regarding execution of the promissory notes. It is further to be noted that once the promissory notes are seen to be admittedly executed, then the presumption under Section 118 of the Negotiable Instrument Act would be available for the plaintiff to rest his claim against the defendants and it would be for the defendants to rebut that presumption by superior evidence. In fact, as the record shows, to prove the contention that promissory notes were executed to guarantee that the parents/parents-in-law of the defendants did not sale the property for one year. In other words, it was for collateral purpose, the defendants have examined defendant no.1 as their own witness only. Apart from his own interested word, defendants have not examined a single witness nor produced any document to rebut the presumption contemplated under Section 118 of the Negotiable Instrument Act. It is needless to mention that ordinary prudent men could not come to the conclusion that promissory

notes executed in front of the notary public were not for consideration. The pleadings and evidence of the defendants is also sufficient to show that they did not trust the plaintiff when the promissory notes were executed. If it was so, and if in fact, the promissory notes were executed for collateral purpose only, then in all the preponderance of probabilities the defendants would have taken something in writing to prove this aspect. However, no such writing of any other collateral document is coming forth and, therefore, I am in agreement with learned lower appellate Court Judge when he finds that the presumption under Section 118 of the Negotiable Instrument Act raised due to admission of execution of promissory notes by the defendants is not rebutted by cogent and conclusive evidence and, therefore, the defence remains to be properly established.

8. In view of this position, I am of the considered view that the lower appellate Court has rightly decreed the suit and, consequently, the appeal has no merits. In the result, the appeal fails and stands dismissed with no order as to costs.

P.V. KAKADE, J.

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